

JUDGMENT OF THE COURT (Second Chamber)

18 December 2007\*

In Case C-186/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 18 April 2006,

**Commission of the European Communities**, represented by D. Recchia and A. Alcover San Pedro, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Spain**, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

\* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen (Rapporteur), K. Schiemann, P. Küris and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2007,

gives the following

**Judgment**

- 1 By its action, the Commission of the European Communities requests the Court to declare that, with regard to the irrigation project for the irrigable area of the Segarra-Garrigues Canal, in the Province of Lleida (Catalonia), the Kingdom of Spain has failed to fulfil its obligations under Articles 2 to 4(1) and (4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, 'the Birds Directive').

## Legal context

2 Under Article 2 of the Birds Directive, Member States are to take the requisite measures to maintain the population of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the EC Treaty applies at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

3 Article 3 of the Birds Directive states as follows:

‘1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.'

4 Article 4 of the Birds Directive provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

- 5 Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive') provides:

'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.'

## **Facts and the pre-litigation procedure**

- 6 In 2001, the Commission received a complaint that the project to irrigate the irrigable area of the Segarra-Garrigues Canal would affect the only two areas important for the conservation of steppe-land birds in Catalonia, also known as 'Important Bird Areas' ('IBAs'), identified as Nos 142 and 144 in the 1998 IBA directory.
  
- 7 By letter of 22 November 2001, the Commission asked the Kingdom of Spain for information concerning that project in particular and the classification as special protection areas ('SPAs') of areas included in IBAs 142 and 144.
  
- 8 Since the Commission did not regard the replies and information supplied by the Spanish authorities as convincing, on 1 April 2004 it sent the Kingdom of Spain a letter of formal notice stating that the Birds Directive had been incorrectly applied in that it had not classified SPAs sufficient in number and size, in particular in the region of the Segarra-Garrigues Canal affected by the irrigation project, and in that it had authorised that project, which would lead to the deterioration or destruction of the habitat of a number of species of birds listed in Annex I to that directive.
  
- 9 The Spanish authorities replied to the letter of formal notice by letter of 21 June 2004.
  
- 10 Taking the view that the infringement of the Birds Directive had not ceased, on 14 December 2004 the Commission issued a reasoned opinion requesting the Kingdom of Spain to take the measures necessary to comply therewith within two months of its receipt.

- 11 Since the Commission did not consider the Spanish authorities' reply to that reasoned opinion, sent on 4 March 2005, to be satisfactory, the Commission decided to bring the present action.

## **The action**

- 12 In its pleadings, the Commission states that the action relates not to the insufficient classification of SPAs but to the authorisation of the irrigation project in the irrigable area of the Segarra-Garrigues Canal and the harmful consequences of that project for certain species of bird listed in Annex I to the Birds Directive.

## **Admissibility**

### *Arguments of the parties*

- 13 The Kingdom of Spain submits, firstly, that, in its reasoned opinion and its application, the Commission has extended the subject-matter of the proceedings, since in the letter of formal notice Spain was requested to submit observations only with regard to a breach of Article 4(1) and (4) of the Birds Directive, but not with regard to a breach of Articles 2 and 3 thereof. Secondly, the Kingdom of Spain points out that the application does not contain any argument intended to establish which of the obligations imposed by Article 4(1) of the Birds Directive have been infringed.

- 14 Whilst noting, on the one hand, the existence of a close connection between Articles 2 to 4 of the Birds Directive and, on the other, the fact that Article 4(1) supplements Article 4(4) of that directive, the Commission defers to the Court with regard to the appropriateness of examining the pleas submitted in the light only of Article 4(4) of the Birds Directive.

### *Findings of the Court*

- 15 With regard to the first point raised by the defendant Member State, it must be recalled that, in accordance with settled case-law, the letter of formal notice sent by the Commission to the Member State and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to be able to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure (see Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 55, and Case C-422/05 *Commission v Belgium* [2007] ECR I-4749, paragraph 25). If that is not the case, that irregularity cannot be regarded as having been cured by the fact that the defendant Member State subsequently submitted observations on the reasoned opinion (see Case 51/83 *Commission v Italy* [1984] ECR 2793, paragraphs 6 and 7).
- 16 In the present case, it is agreed that the letter of formal notice did not contain any mention of an alleged infringement of Articles 2 and 3 of the Birds Directive by the Kingdom of Spain.

17 Consequently, the action is inadmissible in so far as it relates to the complaints alleging infringement of Articles 2 and 3 of that directive.

18 With regard to the second point raised by the Kingdom of Spain, it must be recalled that the reasoned opinion and the action referred to in Article 226 EC must be based on the same pleas and grounds and set out the complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of Community law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see Case C-234/91 *Commission v Denmark* [1993] ECR I-6273, paragraph 16, and Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, paragraph 18).

19 In the present case, the Commission, in its letter of formal notice and reasoned opinion, complained that the Kingdom of Spain has infringed Article 4(1) of the Birds Directive on the ground that the SPAs classified by the Spanish authorities, inter alia in the area affected by the irrigation project of the Segarra-Garrigues Canal, were not sufficient to protect the areas most suitable in number and size in respect of a number of species listed in Annex I to that directive. At the same time, the Commission alleged that the Kingdom of Spain had failed to fulfil its obligations under Article 4(4) of the directive, on the ground that the implementation of that project would create a clear risk of deterioration of the habitat of steppe-land bird species present in the area in question.

20 As stated in paragraph 12 of the present judgment, the action relates not to insufficient classification of SPAs but to the authorisation of the irrigation project in the irrigable area of the Segarra-Garrigues Canal and the harmful consequences of that project for certain species of protected birds.

- 21 Nevertheless, the Commission maintains its plea alleging infringement by the Kingdom of Spain of Article 4(1) of the Birds Directive, not because of insufficient classification of areas as SPAs but by reason of the fact of the authorisation of that irrigation project.
- 22 In those circumstances, with regard to that plea, the grounds of which have been changed in comparison to those stated in the context of the pre-litigation procedure, the present action does not meet the requirements of coherence and precision referred to in paragraph 18 of the present judgment.
- 23 Accordingly, the action, in so far as it alleges that the Kingdom of Spain has infringed Article 4(1) of the Birds Directive, is inadmissible.

## **Substance**

### *Arguments of the parties*

- 24 In support of its action, the Commission submits that the irrigation project in the irrigable area of the Segarra-Garrigues Canal is inside the perimeter of IBAs 142 and 144 and will have a negative impact on certain steppe-land bird species listed in Annex I to the Birds Directive. In that regard, the Commission states that the fact that certain areas of IBAs 142 and 144 affected by the project were excluded from classification as SPAs does not exempt the Kingdom of Spain from the obligation of complying with the requirements imposed by Article 4(4) of the Birds Directive.

- 25 The Kingdom of Spain submits that the Commission has not proved that the irrigation project for the irrigable area of the Segarra-Garrigues Canal infringes the Birds Directive. In any event, the measures of protection which form part of that project are appropriate for the avoidance, in the area covered by it, of the negative consequences referred to in Article 4(4) of that directive.

### *Findings of the Court*

- 26 The first sentence of Article 4(4) of the Birds Directive requires Member States to take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of that article.
- 27 It is clear from the case-law of the Court that Member States must comply with the obligations arising under the first sentence of Article 4(4) of the Birds Directive, even where the areas in question have not been classified as SPAs, provided that they should have been so classified (see Case C-166/97 *Commission v France* [1999] ECR I-1719, paragraph 38, and Case C-388/05 *Commission v Italy* [2007] ECR I-7555 , paragraph 18).
- 28 However, in so far as concerns land classified as an SPA, Article 7 of the Habitats Directive provides that the obligations arising under the first sentence of Article 4(4) of the Birds Directive are replaced, inter alia, by the obligations arising under Article 6(2) of the Habitats Directive as from the date of implementation of the Habitats Directive or the date of classification under the Birds Directive, where the latter date is later (see Case C-117/00 *Commission v Ireland* [2002] ECR I-5335, paragraph 25). Thus, areas which have not been classified as SPAs but should have been so

classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive (see Case C-374/98 *Commission v France* [2000] ECR I-10799, paragraph 47).

- 29 Since the Commission has based its action on Article 4(4) of the Birds Directive, it concerns only the areas affected by the irrigation project in the irrigable area of the Segarra-Garrigues Canal which ought to have been classified as SPAs before expiry of the time-limit fixed in the reasoned opinion.
- 30 In that regard, the Court has held that the IBA 98 directory, which provides an up-to-date list of the areas of importance for the conservation of birds in Spain, constitutes, in the absence of scientific proof to the contrary, a basis of reference permitting an assessment to be made as to whether that Member State has classified areas of a sufficient number and size as SPAs to protect all the bird species listed in Annex I to the Birds Directive and the migratory species not listed in that annex (see Case C-235/04 *Commission v Spain* [2007] ECR I-5415, paragraph 27).
- 31 It is apparent from the documents that certain areas included in IBAs 142 and 144, affected by the irrigation project at issue, such as the areas known as 'Plans de Sió', 'Belianes-Preixana' and 'Secans del Segrià-Garrigues', which are the habitat of groups, inter alia, of little bustard (*Tetrax tetrax*), Dupont's lark (*Chersophilus duponti*), roller (*Coracias garrulus*) and Bonelli's eagle (*Hieraaetus fasciatus*), have been subject to classification or the extension of a classification pursuant to the decision, adopted by the Generalitat of Catalonia on 5 September 2006, designating SPAs and approving the proposal of sites of Community importance.

- 32 Thus it seems that such areas, which ought to have been classified as SPAs before expiry of the time-limit fixed in the reasoned opinion, fall within the protection scheme laid down in the first sentence of Article 4(4) of the Birds Directive, in accordance with the case-law cited in paragraphs 27 and 28 above.
- 33 In that regard, it is important to note that, according to the environmental impact statement published in official journal No 3757 of the Generalitat of Catalonia of 8 November 2002, the irrigation project in the irrigable area of the Segarra-Garrigues Canal is seriously harmful, particularly with regard to the habitats of steppe-land birds, despite the preventive, corrective and compensatory measures proposed in the environmental impact assessment and despite the additional measures set out in the statement itself.
- 34 Annex 3 to that statement indicates that the implementation of such a wide-ranging irrigation project can have a serious impact on the populations of birds under threat and that, accordingly, the plans for re-establishment of the species referred to in that annex should be approved, as should their implementation, intended to ensure the conservation of those species and, if possible, their re-establishment.
- 35 Furthermore, it is not disputed that the works necessary to implement the project, which are expected to last ten years, started during the month of June 2002.
- 36 In those circumstances, it must be held that, by authorising the irrigation project in the irrigable area of the Segarra-Garrigues Canal, the Member State concerned did not fulfil its obligation under the first sentence of Article 4(4) of the Birds Directive to take appropriate measures to avoid, in the areas affected by that project which ought to have been classified as SPAs, the prohibited disturbances, since that obligation exists, in accordance with the case-law of the Court, before any reduction

is observed in the number of birds or any risk of a protected species becoming extinct has materialised (see Case C-355/90 *Commission v Spain* [1993] ECR I-4221, paragraph 15).

37 That finding cannot be called into question by the mere fact that the project, as the Kingdom of Spain has, in essence, submitted, is of considerable importance to the economic and social development of the area which it affects. The Member States' ability significantly to harm areas which ought to have been classified as SPAs and which, in accordance with paragraphs 27 and 28 of the present judgment, fall within the scheme laid down in the first sentence of Article 4(4) of the Birds Directive cannot, in any event, be justified by economic and social requirements (see, to that effect, Case C-57/89 *Commission v Germany* [1991] ECR I-883, paragraphs 21 and 22).

38 Accordingly, the Commission's action must succeed.

39 Consequently, it must be held that, with regard to the areas affected by the irrigation project of the irrigable area of the Segarra-Garrigues Canal which ought to have been classified as SPAs, the Kingdom of Spain has failed to fulfil its obligations under the first sentence of Article 4(4) of the Birds Directive.

40 The remainder of the action is dismissed.

## Costs

- 41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first paragraph of Article 69(3), the Court may order the parties to bear all or part of their own costs, where each party succeeds on some and fails on other heads of claim. Since the Commission was successful only in part, the parties must be ordered to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by authorising the irrigation project in the irrigable area of the Segarra-Garrigues Canal in the Province of Lleida, the Kingdom of Spain has failed to fulfil its obligations under the first sentence of Article 4(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds to take appropriate measures to avoid, in the areas affected by that project which ought to have been classified as special protection areas, the prohibited disturbances;**
2. **Dismisses the action as to the remainder;**
3. **Orders each party to bear its own costs.**

[Signatures]